

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

CC:NER:NJD:NEW:TL-N-4669-99  
RABaxer

date: August 18, 1999

to: Chief, Examination Division, New Jersey District E:1105

from: District Counsel, New Jersey District, Newark

subject: [REDACTED]

Tax Periods: [REDACTED] - [REDACTED]

This memorandum has been prepared in response to your request for assistance and guidance from our office with respect to the statute of limitations for an amended return filed for the year [REDACTED]. The memorandum is based upon the facts outlined below. If the factual statement is incorrect, please notify this office so that we may determine the effect, if any, on the advice rendered.

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DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

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FACTS

The facts as we understand them are as follows:

Amended returns were filed by the taxpayer, [REDACTED] ([REDACTED]), and its Foreign Sales Corporation (FSC) for the years [REDACTED], and [REDACTED]. The taxpayer changed the method of computation of the FSC benefits used on their original returns to the transaction

by transaction method. This resulted in an increase in the FSC combined taxable income and a correlative increase to the FSC commission expense deducted on the Form 1120 of [REDACTED].

You have audited the claim for [REDACTED] and have made adjustments to avoid double grouping. The taxpayer is in agreement with the results of your examination and agreed to similar adjustments in the [REDACTED] and [REDACTED] years.

An issue has arisen, however, with respect to the statute of limitations for the year [REDACTED]. The original [REDACTED] FSC return was on extension and was actually filed on [REDACTED]. The taxpayer filed the amended return for the FSC on [REDACTED]. You state that the Service Center accepted the amended return and credited the FSC's account for the additional tax paid with the amended return.

The taxpayer is contending that the statute of limitations was open under I.R.C. § 6501(e)(1)(A) or in the alternative since the Service had accepted the amended return it should not be disturbed by the examiner.

#### DISCUSSION

Treas. Reg. § 301.6511(a)-1(c) states in part " ... For rules as to time return is deemed filed and tax is considered paid, see section 6513."

A return filed after the due date set forth in the code or regulations, but which is timely because of an extension of time, is considered to have been filed on the actual date of filing and not on the extended due date. I.R.C. § 6513(a). See, T. B. Foster v. United States, 221 F. Supp. 291 (S.D.N.Y. 1963), *aff'd on another issue* 329 F.2d 717 (2<sup>nd</sup> Cir. 1964).

The original [REDACTED] return for the FSC would be deemed filed on [REDACTED] when it was received and date stamped by the Service. The three year period to file a claim for that year under I.R.C. § 6511 would have expired on [REDACTED]. Consequently, the amended return filed on [REDACTED] was not timely filed for purposes of I.R.C. § 6511 and, in fact, was filed after the expiration of the three year statute of limitations.

The FSC and related supplier may, subject to certain restrictions, select the most favorable of the administrative pricing methods of section 925(a) in order to reallocate income generated by export sales from the parent corporation to the FSC.

Temporary Income Tax Reg. 1.925(a)-1T(e)(4) sets forth certain conditions that have to be met for subsequent determinations of transfer price, rental income or commission. Within that regulation, the following sentence is the pivotal point in this case:

In addition, a redetermination may be made by the FSC and related supplier if their taxable years are still open under the statute of limitations for making claims for refund under section 6511 if they determine that a different transfer pricing method or grouping of transactions may be more beneficial.

In this case, the FSC's amended tax return was not filed within the applicable statute of limitations under section 6511. This is fatal to the allowance of any adjustment in this case.

The argument raised by the taxpayer that the statute of limitations under I.R.C. § 6501(e) remained open and allows the filing of the amended return was directly considered by the Tax Court in Union Carbide Corporation v. Commissioner, 110 T.C. 375 (1998).

The Tax Court considered the taxpayer's argument regarding the applicability of section 6501 to the party in the deficiency position for purposes of satisfying the regulation's requirements and rejected it.

After analysis, the court held that the regulation requires that the period of limitations for claiming refunds under section 6511 be open for both the taxpayer and the FSC in order for the taxpayer to claim additional FSC commission expenses for the taxable years at issue.

The actual filing of the amended return by FSC after the expiration of the statute of limitation and the payment of the addition tax on that return is of no effect. The filing of an amended return after the expiration of the statute of limitations is ineffective as a waiver of the statute of limitations and the Service need not give any effect to such a return. See, Melahn v. Commissioner, 9 T.C. 769 (1947).

The payment by a taxpayer of a barred tax liability, whether voluntary or involuntary, automatically becomes an "overpayment" and subject to refund. Diamond Gardner Corp., Transferee v. Commissioner, 38 T.C. 875 (1962). Rev. Rul. 74-580, 1974-2 C.B. 440 provides that a payment of tax that was assessed and paid after the expiration of the period of limitations on assessment, can be

refunded, if within two years after the payment a claim for refund is filed.

CONCLUSION

The issue in your case was exactly on point with that considered in the Union Carbide case. Your determination that the additional claimed expenses of [REDACTED] for [REDACTED] should not be allowed is the proper conclusion.

In addition, you should inform the taxpayer that a claim for refund should be filed on behalf of FSC within two years of the payment of the additional tax on the FSC's amended return to get a refund.

If you have any questions or need further information, please contact Robert A. Baxer at (973) 645-2598.

\_\_\_\_\_/s/  
PATRICK E. WHELAN  
Assistant District Counsel

NOTED:

\_\_\_\_\_/s/  
MATTHEW MAGNONE  
District Counsel

cc: Howard Cubberly  
Examination Group 1105